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In the Supreme Court of the United States

VERIZON INTERNET SERVICES, INC., PETITIONER

v.

RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., ET AL.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

DAVID O. CARSON
General Counsel

JULE L. SIGALL
Associate Register for Policy and International Affairs
United States Copyright Office
Library of Congress
Washington, D.C. 20540

QUESTION PRESENTED

Whether the issuance of a subpoena under 17 U.S.C. 512(h), directing an Internet service provider to identify a user who is allegedly engaging in copyright infringement, violates Article III of the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. *Mineta*, 534 U.S. 103 (2001)	9
Ashwander v. *TVA*, 297 U.S. 288 (1936)	10
BMG Music v. *Doe*, No. Civ. A. 04-650, 2004 WL 953888 (E.D. Pa. Apr. 2, 2004)	12
Feist Publ'ns, Inc. v. *Rural Tel. Serv. Co.*, 499 U.S. 340 (1991)	13
Gordon v. *United States*, 69 U.S. (2 Wall.) 561 (1865)	18
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)	18
Hoffman-La Roche Inc. v. *Sperling*, 493 U.S. 165 (1989)	19
Intel Corp. v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004)	18
Muskrat v. *United States*, 219 U.S. 346 (1911)	18
Nashville, Chattanooga & St. Louis Ry. v. *Wallace*, 288 U.S. 249 (1933)	13, 17
National Collegiate Athletic Ass'n v. *Smith*, 525 U.S. 459 (1999)	9
Richardson v. *Ramirez*, 418 U.S. 24 (1974)	12
United States Catholic Conference v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988)	19
United States v. *Ferreira*, 54 U.S. (13 How.) 40 (1851)	18
United States v. *Morton Salt Co.*, 338 U.S. 632 (1950)	18

Cases—Continued: Page

Walters v. *National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 9-10
Youakim v. *Miller*, 425 U.S. 231 (1976) 9

Constitution, statutes and rules:

U.S. Const.:
Art. III ..... *passim*
§ 2 12
Amend. I 6, 7, 10-11
Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 90 15
Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 19
Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 2
Tit. II, §§ 201-203, 112 Stat. 2877-2886 (17 U.S.C. 512) 2
17 U.S.C. 512 ..... 8, 9
17 U.S.C. 512(a) 2, 5, 7, 8, 9
17 U.S.C. 512(a)-(d) 2
17 U.S.C. 512(b) 2
17 U.S.C. 512(c) 2, 5, 6
17 U.S.C. 512(c)(3)(A) 3, 13
17 U.S.C. 512(d) 2
17 U.S.C. 512(h) ..... *passim*
17 U.S.C. 512(h)(1) 3
17 U.S.C. 512(h)(2)(A) 3, 13
17 U.S.C. 512(h)(2)(B) 3
17 U.S.C. 512(h)(2)(C) 3
17 U.S.C. 512(h)(3) 3
17 U.S.C. 512(h)(4) 4
17 U.S.C. 512(h)(5) 4
17 U.S.C. 512(h)(6) 4, 5
17 U.S.C. 512(k) 6
2 U.S.C. 388 ..... 14, 17

Statutes and rules—Continued: Page

7 U.S.C. 1636b(g) 14
7 U.S.C. 2354(a) 14, 17
7 U.S.C. 2714(a) 14
9 U.S.C. 7 14
12 U.S.C. 2267 14
28 U.S.C. 1782 ..... 14, 18
28 U.S.C. 2351 14
35 U.S.C. 24 ..... 14, 17
42 U.S.C. 7413(b)(2) 14
45 U.S.C. 157(h) 15
47 U.S.C. 401(b) 14
Fed. R. Civ. P.:
Rule 27 ..... 14, 15, 16, 17
Rule 27(a) 7
Rule 27(a)(1) 15
Rule 45 11
Rule 45(c)(2)(B) 5, 14
Rule 45(c)(3) 14
Rule 45(e) 14
Rule 65(b) 17
Fed. R. Crim. P. 41 17

Miscellaneous:

Jesse M. Feder, *Is Betamax Obsolete?*, 37 Creighton L. Rev. 859 (2004) 5
H. R. Conf. Rep. No. 796, 105th Cong., 2d Sess. (1998) 3
H. R. Rep. No. 551, 105th Cong., 2d Sess. Pt. 2 (1998) 2

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OPINIONS BELOW

The opinion of the court of appeals (03-1579 Pet. App. 1a-17a) is reported at 351 F.3d 1229. The opinions of the district court (03-1579 Pet. App. 18a-54a, 55a-111a) are reported at 240 F. Supp. 2d 24 and 257 F. Supp. 2d 244.

JURISDICTION

The court of appeals entered its judgment on December 19, 2003. A petition for rehearing was denied on February 24, 2004 (03-1579 Pet. App. 112a-113a). The petition for a writ of certiorari in No. 03-1579 was filed on May 24, 2004. The conditional cross-petition for a writ of certiorari in No. 03-1722 was filed on June 25,

2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), Pub. L. No. 105-304, 112 Stat. 2860, in order to advance "two important priorities: promoting the continued growth and development of electronic commerce[] and protecting intellectual property rights." H.R. Rep. No. 551, 105th Cong., 2d Sess., Pt. 2, at 23 (1998). Title II of the DMCA addresses the growing use of the Internet to engage in copyright infringement. See Pub. L. No. 105-304, §§ 201-203, 112 Stat. 2877-2886 (17 U.S.C. 512). Title II strikes a balance between the interests of Internet service providers (ISPs), which wish to avoid liability for subscribers' infringing uses of their services, and copyright holders, which wish to protect their intellectual property and minimize online piracy of their works.

a. Title II offers protection to ISPs by creating four statutory safe harbors limiting the potential liability that they would otherwise face under the copyright laws. See 17 U.S.C. 512(a)-(d). Most important for present purposes, Section 512(a) provides that an ISP satisfying certain conditions "shall not be liable * * * for infringement of copyright by reason of the provider's transmitting, routing, or providing connections for, material through a system or network controlled or operated by or for" the ISP. Other subsections provide safe harbors to ISPs for caching (or temporarily storing) copyrighted material (17 U.S.C. 512(b)), storing copyrighted material at a user's direction (17 U.S.C. 512(c)), and linking to copyrighted material (17 U.S.C. 512(d)).

b. In exchange for this protection, Title II seeks to supply "strong incentives for [ISPs] and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." H.R. Conf. Rep. No. 796, 105th Cong., 2d Sess. 72 (1998). Most notably, Title II obligates ISPs to assist copyright holders in identifying users who are believed to be engaged in online copyright infringement.

Under Section 512(h), a copyright holder or its representative is authorized to "request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer." 17 U.S.C. 512(h)(1). In order to obtain a subpoena, the requester must file three items. First, the requester must file a notification, in which the requester, *inter alia*, identifies the copyrighted work and the allegedly infringing material; states that it has "a good faith belief" that the use of the copyrighted material is infringing; and avers that the information it is providing is accurate. 17 U.S.C. 512(c)(3)(A) and (h)(2)(A). Second, the requester must file a proposed subpoena, which "authorize[s] and order[s] [the ISP] to expeditiously disclose to the [requester] information sufficient to identify the alleged infringer * * * to the extent such information is available to the [ISP]." 17 U.S.C. 512(h)(2)(B) and (3). Third, the requester must file a sworn declaration stating that "the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights" under the Copyright Act. 17 U.S.C. 512(h)(2)(C).

If the notification satisfies the necessary requirements, the proposed subpoena is in the proper form, and the declaration is properly executed, the clerk must

"expeditiously" issue and sign the proposed subpoena and return it to the requester for delivery to the ISP. 17 U.S.C. 512(h)(4). Upon receipt of the subpoena, the ISP must "expeditiously" disclose to the requester the information required by the subpoena. 17 U.S.C. 512(h)(5). Except as otherwise provided, the issuance of the subpoena and remedies for noncompliance are governed "to the greatest extent practicable" by the provisions of the Federal Rules of Civil Procedure concerning subpoenas. 17 U.S.C. 512(h)(6).

2. The most pervasive form of online copyright infringement today is peer-to-peer (P2P) file sharing. With P2P software programs such as KaZaA, Morpheus, Grokster, and eDonkey, a user can directly identify, access and transfer files residing on another user's computer. The transferred files are not stored, even temporarily, on the computers of the ISPs that provide the users with Internet access; instead, the ISPs' role is merely to serve as "conduits" for the transmission of the files. Although P2P software can be used to exchange any kind of computer file, it is widely used today for the unlawful exchange of copyrighted music (and, increasingly, copyrighted television programs and movies). The phenomenon of online copyright infringement through P2P file sharing has been facilitated by the increased availability of high-speed Internet access (or "broadband"), which allows large files to be transferred in a short period of time. P2P file sharing presents particular challenges to copyright holders seeking to enforce their copyrights, because users engaging in P2P file sharing are effectively anonymous. Although a copyright holder can determine the files shared by a P2P user and the Internet address of a P2P user's computer, it cannot actually identify the P2P user, since that information is known only to the ISP that provides

the user with Internet access. 03-1579 Pet. App. 2a-3a; see generally Jesse M. Feder, *Is Betamax Obsolete?*, 37 Creighton L. Rev. 859, 862-868 (2004) (explaining the technology of P2P file sharing).

3. Petitioner, the principal trade association for the recording industry, has applied for subpoenas nationwide pursuant to Section 512(h) in order to identify individuals who are using P2P file sharing illegally to disseminate copyrighted music. In July 2002 and February 2003, petitioner obtained two subpoenas from the clerk of the United States District Court for the District of Columbia and served them on cross-petitioner, an ISP. The first subpoena sought identifying information about one of cross-petitioner's users, who was sharing more than 600 files, mostly individual songs, using P2P software. Petitioner provided a notification containing the user's Internet address; a list of the files being shared; the time and date that petitioner had downloaded the files; and a statement that the information was being sought in good faith and would be used only to protect the rights of petitioner's members. The second subpoena, like the first, sought identifying information about a user who was sharing hundreds of songs using P2P software. 03-1579 Pet. App. 23a, 55a.

4. a. Cross-petitioner refused to comply with the first subpoena, contending that Section 512(h) authorized a copyright holder to obtain a subpoena only when the ISP was storing copyrighted material at a user's direction under Section 512(c) and not when the ISP was merely serving as a "conduit" for the transmission of copyrighted material under Section 512(a). Petitioner moved to enforce the subpoena pursuant to Section 512(h)(6) and Federal Rule of Civil Procedure 45(c)(2)(B). 03-1579 Pet. App. 22a-24a.

The district court granted the motion to enforce the subpoena. 03-1579 Pet. App. 18a-54a. The court reasoned that the subpoena power under Section 512(h) applied to all "service providers" as that term was defined in Section 512(k), and was not limited to those ISPs entitled to immunity under Section 512(c). *Id.* at 26a. The court noted that Section 512(h) "is written without limitation or restriction as to its application," *id.* at 31a, and added that, "[i]f Congress intended to restrict or limit the [Section 512(h)] subpoena authority based on where the infringing material resides, one would expect to see that limitation spelled out in [that subsection]," *id.* at 31a-32a. A contrary interpretation of Section 512(h), according to the court, would generate collateral litigation on whether infringing material was stored with, or merely transmitted by, an ISP, *id.* at 35a, and thus would "make[] little sense from a policy standpoint," *id.* at 36a. Finally, the court rejected cross-petitioner's contention that copyright holders could simply file suit against an anonymous infringing user and then obtain a third-party subpoena against the ISP, noting that "[t]he additional burden on copyright owners * * * would be considerable." *Id.* at 45a.

b. Cross-petitioner then moved to quash the second subpoena, this time claiming (i) that Section 512(h) violates Article III of the Constitution because it authorizes federal courts to issue binding process in the absence of a pending case or controversy, and (ii) that Section 512(h) violates the First Amendment rights of its users. 03-1579 Pet. App. 56a. The United States intervened to defend the constitutionality of Section 512(h). *Ibid.*

The district court denied the motion to quash the subpoena. Pet. App. 55a-111a. As to cross-petitioner's Article III challenge, the court reasoned that "the

§ 512(h) subpoena authorization does not represent an innovation that is inconsistent with the limited role of the judiciary as it has traditionally been understood in our constitutional regime." *Id.* at 60a. The court noted that "Congress has enacted several provisions that specifically authorize the clerk of the district court to issue subpoenas despite the absence of a pending case or controversy in the federal courts." *Id.* at 64a. Specifically, the court compared Section 512(h) to Federal Rule of Civil Procedure 27(a), a "deeply rooted" provision that authorizes a federal court to require a person to perpetuate testimony by deposition before an action is filed. *Id.* at 66a. Finally, the court noted that "whatever authority is granted under § 512(h) presents neither a danger of encroachment nor some other threat to the institutional integrity and independence of the judiciary." *Id.* at 74a. The court also rejected cross-petitioner's First Amendment challenge, *id.* at 75a-96a, and denied cross-petitioner's motion for a stay of both orders pending appeal, *id.* at 96a-110a.

5. On appeal, cross-petitioner challenged the two orders on the statutory and constitutional grounds advanced below, and the United States again participated for the purpose of defending the constitutionality of Section 512(h). 03-1579 Pet. App. 1a-2a, 6a.

The court of appeals reversed. 03-1579 Pet. App. 1a-17a. Contrary to the district court's conclusion, the court held that Section 512(h) did not authorize a copyright holder to obtain a subpoena when the ISP was merely serving as a "conduit" for the transmission of copyrighted material under Section 512(a). *Id.* at 6a-16a. The court noted that Section 512(h) requires the requester to identify the allegedly infringing material that is to be "removed" or access to which is to be "disabled." *Id.* at 9a. The court reasoned that an ISP

could neither "remove" nor "disable access to" allegedly infringing material where it was serving as a mere "conduit," since the ISP "does not control the content on its subscribers' computers." *Id.* at 10a. The court rejected petitioner's contention that an ISP could "disable access to" allegedly infringing material simply by terminating the user's account, reasoning that other provisions of Section 512 suggested that disabling access and terminating an account were distinct remedies. *Ibid.* Because the court invalidated the subpoenas on statutory grounds, it refused to reach either of cross-petitioner's constitutional arguments. *Id.* at 2a.

ARGUMENT

In No. 03-1579, petitioner contends that this Court should grant review to consider whether 17 U.S.C. 512(h) authorizes a copyright holder to obtain a subpoena when the ISP was serving as a "conduit" for the transmission of copyrighted material under Section 512(a). Cross-petitioner contends that, in the event that the petition in No. 03-1579 is granted, this Court should also grant review to consider whether 17 U.S.C. 512(h) violates Article III of the Constitution. The court of appeals, however, did not pass on the latter question, nor has any other court of appeals addressed it. Moreover, as the district court correctly concluded, cross-petitioner's constitutional challenge lacks merit. Even if the petition in No. 03-1579 is granted, therefore, the conditional cross-petition should be denied.[1]

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[1] In briefing before the court of appeals, the United States did not address the statutory question presented by petitioner in No. 03-1579. At oral argument and in a supplemental letter, however, counsel for the government informed the panel that the Copyright Office agreed with the district court (and petitioner) that Section

1. a. Because the court of appeals did not reach cross-petitioner's Article III challenge to Section 512(h), it would be inappropriate for this Court to take up that challenge here. Contrary to cross-petitioner's suggestion (Cross-Pet. 29), this Court's ordinary practice is "not [to] decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam).

Moreover, this Court's review would be especially inappropriate because the courts of appeals are not divided on the constitutionality of Section 512(h). Indeed, no court of appeals has even addressed the constitutionality of Section 512(h), much less held that Section 512(h) is unconstitutional. The only court, federal or state, that has thus far addressed the constitutionality of Section 512(h) is the district court in this case—and that court rejected cross-petitioner's constitutional challenge. 03-1579 Pet. App. 59a-75a.

This Court has noted that "[j]udging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform." *Walters* v. *National Ass'n of*

512(h) authorizes a copyright owner to obtain a subpoena when the ISP was serving as a "conduit" for the transmission of copyrighted material under Section 512(a). Cross-Pet. App. 33a-34a; 03-1579 Pet. App. 133a-148a. In subsequent litigation, the United States has briefed at length its position that Section 512(h) applies to "conduit" ISPs and that excusing such ISPs from the obligation to identify infringing subscribers would defeat the legislative goals of Section 512, undermine the basic quid pro quo for Section 512's safe harbors, and impede private enforcement of the nation's copyright laws. See U.S. Br. at 16-33, *RIAA* v. *Charter Communications, Inc.*, No. 03-3802 (8th Cir. argued June 14, 2004).

Radiation Survivors, 473 U.S. 305, 319 (1985) (internal quotation marks omitted); accord *Ashwander* v. *TVA*, 297 U.S. 288, 345 (1936) (Brandeis, J., concurring). There is no reason for the Court to undertake that task before any court of appeals has even addressed the constitutionality of the statute in question, much less concluded that the statute is unconstitutional.

b. Cross-petitioner advances two arguments as to why the Court should intervene at this early stage to address the constitutionality of Section 512(h). Both arguments lack merit.

First, cross-petitioner contends (Cross-Pet. 28-29) that "a ruling from this Court regarding the presence of statutory authority is meaningless for purposes of final resolution of the validity of RIAA's subpoenas without a decision" on cross-petitioner's Article III challenge, and that "[o]nly this Court can definitively resolve the Article III issue." Should this Court grant certiorari on the petition in No. 03-1579 and affirm the court of appeals on the statutory question presented in that petition, however, it would be unnecessary to address the constitutional issue in this case, or in any other case in which a copyright holder sought to issue a subpoena to a "conduit" ISP. On the other hand, should this Court grant certiorari and reverse the court of appeals on the statutory issue, it does not follow that this Court need resolve the constitutional issue *now*, rather than leaving it for the court of appeals to address in the first instance on remand. Indeed, even if the Court were to grant certiorari on the cross-petition, it would not necessarily provide "final resolution" of the validity of petitioner's subpoenas, as cross-petitioner suggests. If the Court were to hold that Section 512(h) is consistent with Article III, the court of appeals would presumably still have to address cross-petitioner's First Amend-

ment challenge—which the court of appeals also did not reach, see 03-1579 Pet. App. 2a, and which cross-petitioner has not raised in its cross-petition. It is therefore unlikely that granting certiorari on cross-petitioner's Article III challenge would materially advance the resolution of this litigation.

Second, cross-petitioner suggests (Cross-Pet. 29) that this Court should grant the cross-petition to "serve judicial economy and preserve the resources of the federal courts from the thousands and potentially tens of thousands of disputed DMCA subpoena enforcement proceedings that would surely be the result of a new RIAA DMCA subpoena spree." Even if this Court were to hold Section 512(h) unconstitutional, however, it would not alleviate the asserted administrative burden. To the contrary, as cross-petitioner readily concedes (Cross-Pet. 7-9), a copyright holder that was unable to avail itself of the subpoena mechanism created by Section 512(h) could simply file a so-called "John Doe" suit against an anonymous infringing user and then obtain a third-party subpoena against the user's ISP under Federal Rule of Civil Procedure 45, thereby entitling it to receive the same information that a Section 512(h) subpoena would provide. As cross-petitioner notes (Cross-Pet. 9), the recording industry has already filed such suits against more than 3000 anonymous infringing users in courts across the country. Although such lawsuits are less likely to be effective than Section 512(h) subpoenas to the extent that ISPs maintain identifying information only temporarily, see 03-1579 Pet. App. 69a, they unquestionably would impose even *greater* demands on the resources of district courts—especially if, as at least one court has held, a separate complaint must be filed against each one of an ISP's allegedly infringing users, see *BMG*

Music v. *Doe*, No. Civ. A. 04-650, 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004). Granting certiorari on cross-petitioner's Article III challenge, therefore, would not materially affect the overall burden on lower courts from litigation concerning online copyright infringement.

2. In any event, certiorari is not warranted because cross-petitioner's Article III challenge is without merit. Far from a "fundamental departure from constitutional principles and historical practice" (Cross-Pet. 4), Section 512(h) is but one of many statutes and rules that enable federal courts to issue subpoenas and other discovery orders in connection with disputes that are not pending in federal court. Like those other provisions, Section 512(h) is entirely consistent with governing Article III principles.

a. Under Article III of the Constitution, the judicial power of the federal courts extends only to "Cases" and "Controversies." U.S. Const. Art. III, § 2. At the outset, cross-petitioner seemingly concedes (Cross-Pet. 7-9, 15-18) that Article III permits a copyright holder to invoke Section 512(h) when the copyright holder has already filed suit against the alleged infringer, and instead contends only that it does not permit a copyright holder to invoke Section 512(h) in the absence of pending litigation. The existence of a cognizable Article III controversy, however, does not depend on the pendency of a complaint, but rather on the existence of a "dispute[] between adverse parties." *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974). The filing of a complaint does not somehow create a controversy under Article III; instead, it is simply a procedural mechanism for bringing an *existing* controversy before the court. Accordingly, this Court has expressly rejected the view that Article III requires that "[a] case or controversy

should be presented by traditional forms of procedure, invoking only traditional remedies." *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 264 (1933). Instead, as the Court has noted, Article III merely "define[s] and limit[s] judicial power, not the particular method by which that power might be invoked." *Ibid.*

For Article III purposes, therefore, the proper inquiry is whether the procedural requirements of Section 512(h) are sufficient to confine the operation of the subpoena mechanism to disputes in which an actual case or controversy is present. They plainly are. In order to obtain a subpoena under Section 512(h), the requester must file a notification of claimed infringement in which the requester identifies the copyrighted work and the allegedly infringing material; states that it has "a good faith belief" that the use of the copyrighted material is infringing; and avers that the information it is providing is accurate. 17 U.S.C. 512(c)(3)(A) and (h)(2)(A). A party seeking a subpoena under Section 512(h) thus must set forth the functional equivalent of a *prima facie* claim of copyright infringement. See *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). In such a case, the requester has alleged that there is a genuine case or controversy, arising under federal law, between the copyright holder and the alleged infringer. The existence of that case or controversy empowers the district court to issue a subpoena in aid of the copyright holder's efforts to vindicate its federal rights.[2]

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[2] The foregoing discussion assumes *arguendo* that the issuance of a subpoena under Section 512(h)—a purely ministerial function—involves an exercise of Article III judicial power. The district court identified an alternative ground for rejecting the Article III

b. Contrary to cross-petitioner's suggestion (Cross-Pet. 24-27), Section 512(h) does not represent a novel grant of authority to the federal courts. Numerous other statutes and rules provide for the issuance of judicial process by an Article III court even in the absence of an underlying action. See, *e.g.*, Fed. R. Civ. P. 27 (order compelling deposition "to perpetuate testimony regarding any matter that may be cognizable" in a federal court); 2 U.S.C. 388 (subpoena for contested election before House of Representatives); 7 U.S.C. 2354(a) (subpoena for administrative claims before Plant Variety Protection Office); 9 U.S.C. 7 (judicially enforceable summons for arbitration proceedings under Federal Arbitration Act); 28 U.S.C. 1782 (order compelling testimony and document production for use in proceeding before foreign tribunal); 35 U.S.C. 24

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challenge, concluding that the mere issuance of a subpoena under Section 512(h) does not involve the exercise of Article III judicial power at all (and therefore does not implicate Article III's case-or-controversy requirement). See 03-1579 Pet. App. 61a-64a. To be sure, traditional subpoenas are ordinarily regarded as judicial orders (even if issued, as here, without direct judicial involvement), and failure to comply with such subpoenas "without adequate excuse" may be deemed contempt of court. Fed. R. Civ. P. 45(e). The compulsory character of a subpoena, however, is more nominal than real: the recipient may object to the subpoena, in which case "the party serving the subpoena shall not be entitled to inspect and copy the materials [being sought] * * * except pursuant to an order of the court by which the subpoena was issued," Fed. R. Civ. P. 45(c)(2)(B), or move to quash or modify the subpoena, Fed. R. Civ. P. 45(c)(3). Thus, it is not readily apparent that the judicial *enforceability* of a subpoena renders its mere *issuance* the exercise of judicial power, any more than the issuance of a judicially enforceable administrative order by an executive agency constitutes the exercise of such power. See, *e.g.*, 7 U.S.C. 1636b(g), 2714(a); 12 U.S.C. 2267; 28 U.S.C. 2351; 42 U.S.C. 7413(b)(2); 47 U.S.C. 401(b).

(subpoena for administrative claims before Patent and Trademark Office); 45 U.S.C. 157(h) (subpoena for arbitration proceedings under the Railway Labor Act). Those provisions cannot meaningfully be distinguished from Section 512(h).

i. Most notably, Federal Rule of Civil Procedure 27 authorizes district courts to issue orders compelling depositions in order to "perpetuate testimony regarding any matter that may be cognizable in" federal court, but that the petitioning party "is presently unable to bring * * * or cause * * * to be brought." Fed. R. Civ. P. 27(a)(1). Like Section 512(h), therefore, Rule 27 permits a federal court to compel the giving of testimony with respect to disputes that "may be cognizable" in federal court, but that are not yet (and may never be) the subject of pending federal litigation. Rule 27 is the latest version of a provision that dates from the Judiciary Act of 1789. See Act of Sept. 24, 1789, ch. 20, § 30, 1 Stat. 90 (providing that a federal circuit court "may, according to the usages in chancery[,] direct" the taking of depositions *in perpetuam rei memoriam* "if they relate to matters that may be cognizable in any court of the United States").

Cross-petitioner concedes that Rule 27 is consistent with Article III, but insists that Section 512(h) may be distinguished from Rule 27 on four grounds. None of cross-petitioner's contentions is availing.

First, cross-petitioner asserts (Cross-Pet. 25) that a party seeking to preserve testimony under Rule 27 "must state under oath an unequivocal intention to bring a lawsuit in federal court." To the contrary, Rule 27 requires a party to assert only that it "expects to be a party to an action cognizable in" federal court, but "is presently unable to bring it or cause it to be brought." Rule 27 therefore does not require a party to provide

any assurance that a lawsuit will in fact be filed. Moreover, Rule 27 applies not only to potential plaintiffs, but also to potential defendants, who obviously have no control over the filing of any lawsuit. Just as it is entirely possible that no federal lawsuit will be filed when a party seeks to preserve testimony under Rule 27, so too is it entirely possible that no lawsuit will ultimately be filed when a requester seeks a subpoena under Section 512(h) (if, for instance, the requester merely warns the would-be defendant about his conduct upon learning his identity, or settles with him before a complaint is filed). In each case, the mere possibility that the underlying dispute will be resolved without further litigation does not render the dispute any less of a case or controversy for Article III purposes.

Second, cross-petitioner contends (Cross-Pet. 25-26) that "Rule 27 is not a discovery tool" and that "it authorizes the perpetuation of known evidence in the face of an averment as to its imminent loss." To the extent that Section 512(h) is designed to discover new information rather than to preserve previously known information, cross-petitioner does not explain why this distinction is of constitutional import. In any event, Section 512(h) is not readily distinguishable from Rule 27 in this respect, because one of the primary purposes of Section 512(h) is to preserve evidence that, while not yet known to the requester, may be lost if judicial action is not taken. See 03-1579 Pet. App. 69a.

Third, cross-petitioner suggests (Cross-Pet. 26) that Rule 27 "requires notice to the potential adverse party" before any judicial process issues, whereas Section 512(h) "does not require any notice to the real party in interest (the anonymous subscriber)." Nothing in Article III, however, establishes adversarial proceedings as a prerequisite to judicial action. Federal courts

have the unquestioned authority to issue search warrants and temporary restraining orders—vastly more substantial exercises of judicial power than the issuance of a subpoena—on an *ex parte* basis. See Fed. R. Crim. P. 41; Fed. R. Civ. P. 65(b).

Fourth, cross-petitioner argues (Cross-Pet. 27) that "a suit to perpetuate testimony has roots in equity that predate the Constitution itself." This Court, however, has long rejected the argument that only those procedural mechanisms that were available at the time of the Framing are consistent with Article III. See, *e.g.*, *Nashville, Chattanooga & St. Louis Ry.*, 288 U.S. at 264. Because Section 512(h) requires some showing of a genuine underlying case or controversy that arises under federal law, it is indistinguishable from Rule 27 for Article III purposes, notwithstanding the fact that it is of more recent vintage.

ii. Cross-petitioner attempts to distinguish some of the numerous other federal laws that authorize the issuance of judicial process even in the absence of an underlying action. Those contentions likewise lack merit. With regard to 2 U.S.C. 388, which requires "a judge or clerk of the United States district court" to issue subpoenas for election contests before the House of Representatives, cross-petitioner notes (Cross-Pet. 24) that those subpoenas are not enforceable by Article III courts. Cross-petitioner does not explain, however, why the unenforceability of judicial process would render a statute *less* problematic under Article III. With regard to 7 U.S.C. 2354(a) and 35 U.S.C. 24, which require district court clerks to issue subpoenas for claims in administrative proceedings, cross-petitioner contends (Cross-Pet. 24) that those provisions "involve an underlying case or controversy * * * pending before a federal agency." But cross-petitioner thereby

concedes that a dispute arising under federal law need not be pending in an Article III *court* for that court to issue valid process. Finally, cross-petitioner says nothing at all about 28 U.S.C. 1782, a much broader discovery provision that dates back nearly 150 years. As this Court noted last Term in *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004), that provision authorizes discovery for use in a foreign proceeding even if that proceeding is not "pending" or "imminent," but is merely "within reasonable contemplation." *Id.* at 2479-2480. If Article III permits a federal court to issue discovery orders even when a complaint is not yet pending before a *foreign* tribunal, it surely authorizes a federal court to issue a more limited kind of discovery order when the requester makes a *prima facie* showing that it could commence litigation in that very court.

c. Cross-petitioner cites (Cross-Pet. 15) a number of decisions from this Court for the proposition that federal courts cannot issue judicial process absent an underlying lawsuit. All of those decisions are inapposite.

In a series of decisions, this Court has invalidated statutes that required federal courts to issue advisory opinions. See *Muskrat* v. *United States*, 219 U.S. 346 (1911); *Gordon* v. *United States*, 69 U.S. (2 Wall.) 561 (1865); *United States* v. *Ferreira*, 54 U.S. (13 How.) 40 (1851); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). The venerable rule against advisory opinions, however, has no bearing on the constitutionality of Section 512(h). Unlike the issuance of advisory opinions, the issuance of subpoenas has long been a routine responsibility of federal courts, and can fairly be characterized as a duty "of a judicial nature." *Id.* at 411.

In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the Court, in the course of sustaining the

enforceability of an administrative subpoena, suggested that a federal court, unlike an administrative agency, may not engage in a "'fishing expedition' to see if it can turn up evidence of guilt." *Id.* at 641-642. Section 512(h) presents no such difficulties, because a copyright holder must have "evidence of guilt" before it can apply for a Section 512(h) subpoena. Far from unearthing violations of the copyright laws, a section 512(h) subpoena serves simply to identify the persons responsible for violations already alleged to have occurred.

In *United States Catholic Conference* v. *Abortion Rights Mobilization, Inc.*, 487 U.S. 72 (1988), the Court held that, if a federal court lacks subject matter jurisdiction over the underlying complaint, a subpoena issued pursuant to an assertion of jurisdiction may be challenged as void. *Id.* at 80. Where a court is issuing a subpoena under Section 512(h), however, it is unquestionable that the court would have subject matter jurisdiction over the underlying claim of copyright infringement. Nothing in *United States Catholic Conference* suggests that Article III disables Congress from authorizing the issuance of subpoenas in that circumstance simply because the subpoena is issued before the complaint is actually filed.

Finally, in *Hoffman-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989), the Court held that federal district courts have discretionary authority to facilitate notice to potential plaintiffs in suits brought under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* 493 U.S. at 169-170. The Court did not address any Article III issue in its opinion, but instead merely cautioned against judicial participation in the "solicitation of claims," out of concern for "respect[ing] judicial neutrality." *Id.* at 174. No such concern about the judicial solicitation of claims is

implicated by the issuance of a subpoena under Section 512(h), which serves merely to assist the requester in identifying a potential defendant who could otherwise be sued anonymously.

3. Both of the issues presented by the petition and conditional cross-petition are raised in a case currently pending before the Eighth Circuit. See *RIAA* v. *Charter Communications, Inc.*, No. 03-3802 (argued June 14, 2004). As noted above, see p. 8 note 1, *supra*, the United States has intervened in that case and has filed a brief defending the constitutionality of Section 512(h) and supporting petitioner's interpretation of the scope of that section. If the Eighth Circuit agrees with the United States that Section 512(h) authorizes a copyright holder to obtain a subpoena when an ISP was merely serving as a "conduit" for the transmission of copyrighted material under Section 512(a), the Eighth Circuit will have to reach the constitutional issue presented by the cross-petition. Should the Eighth Circuit hold that Section 512(h) violates Article III, such a decision would provide this Court with a more suitable vehicle than this case in which to consider the constitutional issue. Moreover, in the event that the Court declines to grant the petition in this case, the Eighth Circuit's decision will also present a further opportunity for this Court to consider the full range of issues presented by the petition and the conditional cross-petition. Even if the Article III challenge advanced by cross-petitioner were otherwise appropriate for this Court's review, therefore, the cross-petition should be denied.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
SCOTT R. MCINTOSH
Attorneys

DAVID O. CARSON
General Counsel
JULE L. SIGALL
Associate Register for Policy and International Affairs
United States Copyright Office
Library of Congress

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